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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SANDRA C. PARKER, INDIVIDUALLY, AND AS NEXT FRIEND OF DANA M. PARKER, AND DANA M. PARKER,
Petitioners,

VS.

RODNEY BOYER, DAN DELL, SIMON RISK, AND MULTI-MEDIA KSDK, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

FRANK SUSMAN *
GREGORY K. ALLSBERRY
WENDY S. BRAFMAN
SUSMAN, SCHERMER, RIMMEL & SHIFRIN, L.L.C.
Aragon Place—Tenth Floor
7711 Carondelet Avenue
St. Louis, Missouri 63105-3388
(314) 725-7300
Counsel for Petitioners
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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THE QUESTIONS PRESENTED FOR REVIEW

I

Did the Court of Appeals, in conflict with the Second Circuit, correctly determine that Respondent police officers Boyer, Dell and Risk, were entitled to qualified immunity, when they assisted and permitted Respondent Multi-Media KSDK, Inc.'s news crew to enter Petitioner's home while executing a search warrant and to film Petitioners in their home, when the news crew's presence was neither in furtherance nor in aid of the execution of the search warrant by Respondent police officers, but was solely to film Petitioners for its own commercial news broadcast purposes?

II

Did the Court of Appeals correctly determine that Respondent police officers, Boyer, Dell and Risk, were entitled to qualified immunity, without first determining whether they had violated the constitutional rights of Petitioners?

III

Did the Court of Appeals correctly hold that Respondent Multi-Media KSDK, Inc.'s news crew was not acting under color of state law, when it entered Petitioners' home with direct assistance and permission of Respondent Police Officers, although neither in furtherance nor in aid of Respondent Police Officers' execution of a search warrant, but instead to film Petitioners solely for its own commercial news broadcast purposes?

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS	1
STATEMENT OF BASIS FOR THIS COURT'S JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONSIDERATIONS FOR THIS COURT'S REVIEW	5
I. DID THE COURT OF APPEALS, IN CONFLICT WITH THE SECOND CIRCUIT, CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY, WHEN THEY ASSISTED AND PERMITTED RESPONDENT MULTI-MEDIA KSDK, INC.'S NEWS CREW TO ENTER PETITIONERS' HOME WHILE EXECUTING A SEARCH WARRANT AND TO FILM PETITIONERS IN THEIR HOME, WHEN THE NEWS CREW'S PRESENCE WAS NEITHER IN FURTHERANCE NOR IN AID OF THE EXECUTION OF THE SEARCH WARRANT BY RESPONDENT POLICE OFFICERS, BUT WAS SOLELY TO FILM PETITIONERS FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSE?	6
A. The Search of Petitioners Parkers' Home Was Unreasonable Under the Fourth Amendment..	6

TABLE OF CONTENTS—Continued

Page

B. Respondent Police Officers Are Not Entitled to Qualified Immunity, Having Violated a Clearly Established Constitutional Right 10

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING WHETHER THEY HAD VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONERS? 11

III. DID THE COURT OF APPEALS CORRECTLY HOLD THAT RESPONDENT MULTI-MEDIA KSDK, INC.'S NEWS CREW WAS NOT ACTING UNDER COLOR OF STATE LAW, WHEN IT ENTERED PETITIONERS' HOME WITH THE ASSISTANCE AND PERMISSION OF RESPONDENT POLICE OFFICERS, ALTHOUGH NEITHER IN FURTHERANCE NOR IN AID OF RESPONDENT POLICE OFFICERS' EXECUTION OF A SEARCH WARRANT, BUT INSTEAD TO FILM PETITIONERS SOLELY FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSES? 12

A. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) 13

B. *Lugar*'s First Prong 13

C. *Lugar*'s Second Prong 14

D. Theories of State Action 14

(1) Joint Participation Test 15

(2) Symbiotic Relationship and Nexus Tests .. 17

CONCLUSION 19

TABLE OF CONTENTS—Continued

APPENDIX: Page

Opinion of the U.S. Court of Appeals for the Eighth Circuit 1a

Judge Rosenbaum's Concurrence 6a

Judge Arnold's Concurrence and Dissent..... 7a

Judgment of the U.S. Court of Appeals for the Eighth Circuit 8a

Eighth Circuit's Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.... 10a

Supplemental Order of the U.S. District Court for the Eastern District of Missouri 11a

Order of the U.S. District Court for the Eastern District of Missouri 17a

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970)	15, 17
Anderson v. Creighton, 483 U.S. 635 (1987)	10
Ayeni v. Mottola, 848 F.Supp. 362 (E.D.N.Y. 1994), *affirmed*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1689 (1995)	6-8, 11
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 179 (1995)	9
Boyd v. Knox, 47 F.3d 966 (8th Cir. 1995)	11
Branzburg v. Hayes, 408 U.S. 665 (1972)	16
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995)	7, 9-10
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	17
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	10
Jones v. Coonce, 7 F.3d 1359 (8th Cir. 1993)	10
Kelly v. Foti, 77 F.3d 819 (5th Cir. 1996)	12
Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973)	17
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	13-14, 16
Manzano v. South Dakota Dept. of Social Servs., 60 F.3d 505 (8th Cir. 1995)	11
McMillian v. Johnson, 88 F.3d 1554 (11th Cir. 1996)	12
Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)	16
Parker v. Clarke, 905 F.Supp. 638 (E.D. Mo. 1995), *amended* at 910 F.Supp. 460 (E.D. Mo. 1995), *affirmed in part and reversed in part, sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996)	1
Payton v. New York, 445 U.S. 573 (1980)	7
Pell v. Procunier, 417 U.S. 817 (1974)	16
Pro v. Donatucci, 81 F.3d 1283 (3d Cir. 1996)	11
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952)	18
Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984)	18
Siegert v. Gilley, 500 U.S. 226 (1991)	11
Soldal v. Cook County, Ill., 506 U.S. 56 (1992)	7

TABLE OF AUTHORITIES—Continued

	Page
Taylor v. Meacham, 82 F.3d 1556 (10th Cir. 1996)	12
United States v. Price, 383 U.S. 787 (1966)	15
United States v. United States Dist. Ct., 407 U.S. 297 (1972)	7
Zemel v. Rusk, 381 U.S. 1 (1965)	16
Constitutional Provision	
Amendment IV to the United States Constitution	1
Statutes	
18 U.S.C. § 3105	8
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	5
28 U.S.C. § 1343	5
42 U.S.C. § 1983	1

PETITION FOR A WRIT OF CERTIORARI

Petitioners Sandra C. Parker and Dana M. Parker respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this cause.

CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

Parker v. Clarke, 905 F.Supp. 638 (E.D.Mo. 1995), *amended* at 910 F.Supp. 460 (E.D.Mo. 1995).

Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996).

STATEMENT OF BASIS FOR THIS COURT'S JURISDICTION

The judgment and order sought to be reviewed is the Opinion of the United States Court of Appeals for the Eighth Circuit entered on August 16, 1996.

An Order denying rehearing by the panel and denying rehearing *en banc* by the United States Court of Appeals for the Eighth Circuit was entered on September 4, 1996.

The statutory authority for this Court's jurisdiction is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Amendment IV to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

On the evening of Wednesday, February 9, 1994, Respondent Multi-Media KSDK, Inc.'s ("KSDK") news crew and Respondent police officers Boyer, Dell and Risk ("Police Officers") from the City of St. Louis ("City") Police Department jointly entered and searched Petitioners' ("Parkers") home. At the time of the search, Randall Jackson ("Jackson") was a KSDK street reporter and weekend anchor newsperson. Prior to that date, Jackson had inquired of City's police department about reporting on its gun suppression program. City's Police Officers told him that they would be conducting a search the next week. On the morning of the search, Jackson was invited by City's Police Officers to ride along with them in order to profile the weapons seizure procedure.

Police Officer Sgt. Risk had informed Police Officer Boyer at roll call earlier that evening that the KSDK news crew would be riding that night with him and his partner, Police Officer Dell and that KSDK was interested in City police department's gun suppression efforts. Sgt. Risk knew at the time that Police Officer Boyer had a search warrant in hand. This search warrant did not authorize Police Officers to take a television news crew (or anyone else) with them into or to film anything or anyone within the Parkers' home, while executing the warrant.

City's Police Officers argreed with KSDK's news crew upon a place and time to meet, prior to driving together to the Parkers' home. KSDK's news crew consisted of Jackson and his cameraman Jeff McCollum ("McCollum"). KSDK knew that Jackson and McCollum were accompanying the City's Police Officers in the execution of this search warrant. The news crew left their KSDK's marked vehicle at the prearranged meeting's location and got into City's police car occupied and operated by Police Officers Boyer and Dell. When he picked them up, Boyer told Jackson and McCollum that he would be executing a search warrant. Police Officer Sgt. Risk, a patrol supervisor for the City's Mobile Reserve Unit, also knew that KSDK's news crew would be accompanying the Police Officers during the search.

After leaving the prearranged meeting location, Police Officers Boyer and Dell drove KSDK's news crew Jackson and McCollum directly to the Parker's residence to execute the search warrant. McCollum began filming as soon as he and Jackson exited the police car in front of the Parkers' home.

City's Police Officers entered the Parkers' residence first, and Jackson and McCollum entered directly behind the Police Officers. They did not knock before entering and did not use a key to enter. As they entered, City Police Officers yelled "drug bust," "come out," "stay in here" and "don't move."

Sandra C. Parker and her 15 year old daughter Dana were home at the time that KSDK's news crew and City's Police Officers jointly entered the home. Dana was in the second floor bathroom. She heard people running up the steps and as she reached for the door, a City Police Officer was opening the door. Three or four City Police Officers had guns pointed at her, saying "Get your hands up. Get downstairs." One gun was pointed directly at her head. KSDK's news crew filmed Dana as she went downstairs

with her hands up, in compliance with the City Police Officers' request. The light from the camera was very bright in her face.

KSDK's news crew did not seek permission from Dana to film her. She did not speak with Jackson or McCollum. Her only conversation with a City Police Officer was after she had descended the stairs and was ordered by City's Police Officers to "sit down" and "don't touch nothing. You can't answer the phone."

Sandra C. Parker was sitting in her dining room when KSDK's news crew and City's Police Officers swept into her home. At no time did she give the City police nor KSDK's employees permission to film her or her daughter Dana, or to broadcast publicly their images or film of their home on television. McCollum started filming as a City Police Officer asked Ms. Parker about a gun she had never seen.

KSDK on several occasions publicly aired the film footage on its news broadcasts showing City's Police Officers entering the residence and Dana descending the stairs at gun point, at the direction of City's Police Officers. McCollum also filmed a weapon and what appeared to be drugs, while Boyer held up these items for the camera. No arrests were ever made nor any illegal weapons or drugs discovered as a result of this search.

Neither Jackson nor McCollum, nor any other employee of KSDK sought permission to enter into or to film inside the Parkers' home. Jackson and McCollum entered the foyer, the living room, the basement and one of the upstairs bedrooms. They would not have entered the residence without City Police Officers' cooperation and approval.

After leaving the Parkers' residence, City's Police Officers and Jackson and McCollum jointly entered another residence that same evening, where the residents were also present.

On other occasions, both before and after this search, City's Police Officers have conducted searches in private homes accompanied by news media personnel. Some of these other searches have also occurred inside of private homes. Permitting news media personnel to be present during such searches is consistent with City's police department policy and practice, even when the home's residents have not consented to the broadcast of their images.

It is neither usual nor extraordinary for the news media to ride with City's police officers. According to City police department's Chief, it was "not improper for the police to have, in essence, stood by while the media were present during the conduct of the search warrant" inside a private home.

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

CONSIDERATIONS FOR THIS COURT'S REVIEW

This Court should review the opinion below because, as herein noted, it directly conflicts with opinions of other Circuit Courts of Appeal and with relevant decisions of this Court.

The growing proliferation of news gathering organizations, as well as the development of greater and more intrusive methods of gathering information, at the expense of individual liberties and privacy, make the questions and issues presented here matters of federal importance and of concern to all citizens.

I. DID THE COURT OF APPEALS, IN CONFLICT WITH THE SECOND CIRCUIT, CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY, WHEN THEY ASSISTED AND PERMITTED RESPONDENT MULTIMEDIA KSDK, INC.'S NEWS CREW TO ENTER PETITIONERS' HOME WHILE EXECUTING A SEARCH WARRANT AND TO FILM PETITIONERS IN THEIR HOME, WHEN THE NEWS CREW'S PRESENCE WAS NEITHER IN FURTHERANCE NOR IN AID OF THE EXECUTION OF THE SEARCH WARRANT BY RESPONDENT POLICE OFFICERS, BUT WAS SOLELY TO FILM PETITIONERS FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSES?

A. The Search of Petitoners Parkers' Home Was Unreasonable Under the Fourth Amendment.

Respondent Police Officers' encouragement, permission and facilitation of Respondent KSDK news crew's intrusion into Petitioners Parkers' home constituted a clear violation of Petitioners Parkers' Fourth Amendment rights.

The Fourth Amendment ensures "[t]he right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures."

> The reasonableness requirement of the Fourth Amendment applies not only to prevent searches and seizures that would beu nreasonable if conducted at all, but also to ensure reasonableness in the manner and scope of searches and seizures that are carried out, whethe pursuant to a warrant or under 'exigent circumstances.'

Ayeni v. Mottola, 35 F.3d 680, 684 (2d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1689 (1995).

Indeed, the fundamental purpose of the Fourth Amendment is to protect the sanctity of the home through pro-

scription of the general warrant. *See: Buonocore v. Harris*, 65 F.3d 347, 353-56 (4th Cir. 1995) (citing *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992); *Payton v. New York*, 445 U.S. 573, 585 (1980); and *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972)). In discussing the invalidity of the general warrant, the Fourth Circuit concluded that "as early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to further the *government's purposes.*" *Buonocore*, 65 F.3d at 354.

To endorse Respondent Police Officers' conduct of bringing the news media into Petitioners Parkers' home during the otherwise lawful execution of a search warrant would reverse nearly 400 years of common law protection of private homes. The Framers of our Constitution surely did not intend for the police to use search warrants as free admission passes into private homes for both themselves and anyone they might choose to invite as their welcomed guests for their or their guests' entertainment.

The Second Circuit has addressed an identical fact scenario—and has found violation of the Constitution. In *Ayeni*, federal Secret Service Agents executed a search warrant in plaintiffs' home, based upon information that an individual who resided in the apartment was committing credit card fraud. *Id.* at 683. Only the wife and the minor child of the target individual were home during the search, and neither of those two persons was a suspect. *Ibid.* Approximately two hours after the search began, additional Secret Service Agents entered the apartment with the search warrant and the members of a CBS television crew. *Ibid.* The search warrant did not authorize the presence of CBS and the news crew did not assist in the search. *Id.* at 686. Without plaintiffs' consent, CBS videotaped them and the police officers' search of their home. However, in *Ayeni* CBS did not broadcast any of the footage that it had filmed. *Id.* at 684.

The Second Circuit held that the plaintiffs had alleged a clear violation of their Fourth Amendment rights and that defendant Secret Service agents' claim of qualified immunity was without merit.

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant . . . [The Secet Service agent] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

Id. at 686. The Appellate Court aptly noted that "[a] private home is not a soundstage for law enforcement theatricals." *Ibid.*

The *Ayeni* court also found statutory reinforcement for its conclusion that the Secret Service agents had violated the Fourth Amendment. 18 U.S.C. § 3105 provides that:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

"Though the statute [§ 3105] is not determinative of the scope of the Fourth Amendment, it provides some basis for giving content to the Amendment's generalized standard of reasonableness." *Id.* at 687. Thus, the *Ayeni* court concluded, the agents conducted an unreasonable search because they brought unauthorized individuals into the Ayeni's home.

Respondent Police Officers brought Respondent KSDK's news crew into Petitioners Parkers' home, knowing the crew would be filming for broadcasting purposes and despite the fact that the search warrant did not authorize the news crew's presence. Respondent Police Officers drove Respondent KSDK's news crew to Petitioners Parkers' residence and facilitated their entry into the home, without the consent of its residents.

No federal appellate court has held contrary to the Second Circuit's holding in *Ayeni*. The Fourth Circuit recently endorsed the rationale of *Ayeni* in *Buonocore*, 65 F.3d at 356 n. 7. In *Buonocore*, a homeowner sued officials, as well as private parties, under § 1983 for violation of his Fourth and Fourteenth Amendments rights. Officials had invited a telephone company employee to enter the plaintiff's residence during the execution of a search warrant to help identify stolen telephone company equipment. *Id.* at 350. The search warrant neither authorized the private party's presence nor mentioned the telephone company equipment. *Ibid.* The Fourth Circuit held plaintiff had alleged a violation of his Fourth Amendment rights. "To conclude otherwise would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant." *Id.* at 359. Similarly, the search warrant in this case neither authorized Respondent KSDK's film crew to be present in Petitioners Parkers' home nor to search nor to seize visual images of individuals not targets of the search.

Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 179 (1995) (*Bills II*) also supports Petitioners Parkers' position. In *Bills II*, the Sixth Circuit considered the issue of whether a police officer was entitled to qualified immunity under § 1983, after inviting an unauthorized General Motors security officer into a private home during the execution of search warrants. The Sixth Circuit stated that "the presence of pri-

vate citizens at a search" may be lawful "when they are assisting the police" (citing 18 U.S.C. § 3105). *Id.* at 603. Here, Respondent KSDK's news crew did nothing to assist Respondent Police Officers in executing the search warrant.

B. Respondent Police Officers Are Not Entitled to Qualified Immunity, Having Violated a Clearly Established Constitutional Right.

Government officials performing discretionary functions are not entitled to qualified immunity, if their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *See* also *Anderson v. Creighton,* 483 U.S. 635, 638-39 (1987).

Harlow focuses on the objective legal reasonableness of the public official's act. *Buonocore* confirms that precise factual precedent need not exist for there to be a clearly established right. The phrase "clearly established":

> 'includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked.' [quoting *Anderson,* 483 U.S. at 640.] The right to be free from government officials facilitating a private person's general search of the sort Buonocore alleges was conducted here, is 'manifestly included' within 'core' Fourth Amendment protection . . . 'the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles.' *Eberhardt v. O'Malley,* 17 F.3d 1023, 1028 (7th Cir. 1994).

Buonocore, 65 F.3d at 357.

Indeed, "qualified immunity may not be available even though the very act in question has not specifically been held unlawful." *Jones v. Coonce,* 7 F.3d 1359, 1362 (8th Cir. 1993). "It would be, arguably, grossly unreasonable

for a government agent not to have known that the presence of private persons he invited in so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant." *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The District Court in *Ayeni* concluded that, "[t]he action of . . . [the government agent] was so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution." *Id.* at 368.

The fact that the appellate decision in *Ayeni* was after the incident in this case is not significant. The Second Circuit in *Ayeni* merely reiterated the clear constitutional principles involved, it did not establish them. Petitioners Parkers' Fourth Amendment rights existed in unequivocal and recognized fashion long before the Second Circuit's decision in *Ayeni*.

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING THEY HAD VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONERS?

The Eighth Circuit's fractured opinion failed to address the unconstitutionality of Respondent Police Officers' actions, before it prematurely decided the issue of qualified immunity. In District Judge Rosenbaum's special concurrence, he notes both this Court's rulings and recent Eighth Circuit rulings requiring this two step process. *See: Seigert v. Gilley*, 500 U.S. 226, 231-32 (1991); *Manzano v. South Dakota Dept. of Social Servs.*, 60 F.3d 505, 509 (8th Cir. 1995); and *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995). *See*, also: *Pro v. Donatucci*, 81 F.3d

1283, 1287 (3rd Cir. 1996); *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996); *Taylor v. Meacham*, 82 F.3d 1556, 1559 (10th Cir. 1996); and *McMillian v. Johnson*, 88 F.3d 1554, 1564 (11th Cir. 1996).

The failure of Circuit Judge Morris Sheppard Arnold's lead opinion to first consider whether a constitutional violation had occurred is compounded by the opinion by Chief Circuit Judge Richard S. Arnold, concurring in part and dissenting in part, which held that Respondent KSDK were state actors for purposes of 42 U.S.C. § 1983, without any finding of a constitutional violation by either Respondent Police Officers or by Respondent KSDK or a finding as to whether qualified immunity was available to Respondent KSDK.

III. DID THE COURT OF APPEALS CORRECTLY HOLD THAT RESPONDENT MULTI-MEDIA KSDK, INC.'S NEWS CREW WAS NOT ACTING UNDER COLOR OF STATE LAW, WHEN IT ENTERED PETITIONERS' HOME WITH THE DIRECT ASSISTANCE AND PERMISSION OF RESPONDENT POLICE OFFICERS, ALTHOUGH NEITHER IN FURTHERANCE NOR IN AID OF RESPONDENT POLICE OFFICERS' EXECUTION OF A SEARCH WARRANT, BUT INTSTEAD TO FILM PETITIONERS SOLELY FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSES?

Under 42 U.S.C. § 1983, Congress expressly furnished a remedy for violations of federal constitutional rights, when the violator acts under color of state law as a governmental official or under the mantle of state authority. When the offender is a private (non-governmental) party, the plaintiff must establish that the defendant engaged or participated in governmental action at the time of the violation and injury.

A. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

In Lugar, this Court created a two part test to assist in determining the existence of state action.

> First, the [unconstitutional] deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Id. at 937. In *Lugar*, plaintiff brought suit under § 1983 against defendant corporation which had attached plaintiff's property pursuant to a state prejudgment attachment statute. *Id.* at 924-25. Plaintiff alleged that by attaching his property, defendant corporation had acted "jointly" with the County Sheriff and the County Clerk to violate his Fourteenth Amendment due process rights. Plaintiff Lugar did not name the County officials in his suit. *Ibid.* This Court held that plaintiff had stated a valid § 1983 claim, despite the fact that he had not named the County officials in his suit and that the corporate defendant had relied in good faith upon a presumably valid state law.

B. *Lugar's* First Prong.

The right created by the State here was the privilege of Respondent Police Officers to enter and to search the Petitioners Parkers' residence pursuant to a valid search warrant. Respondent KSDK's news crew could not and would not have entered the Petitioners Parkers' home, except in conjunction with Respondent Police Officer's lawful entry pursuant to the search warrant. The Eighth Circuit's holding below serves to condone a private party acting in concert with governmental officials to violate a person's federal constitutional rights with impunity, as long as each party defendant pursues a different end goal

in the violation of plaintiff's rights. Congress certainly did not intend this result.

> ' "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law . . . [which] does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." '

Lugar, 457 U.S. at 941.

C. *Lugar*'s Second Prong.

For state action to exist, "the party charged with the deprivation must be a person who may fairly be said to be a state actor because . . . he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. Respondent KSDK qualifies as a state actor under both the second and third clauses of the state action prong. Clearly, Respondent KSDK's news crew received significant assistance from Respondent Police Officers in the resulting violation of the Parkers' civil rights. Consequently, KSDK's conduct satisfies this second prong and qualifies, as well, as conduct "otherwise chargeable to the state" under the third "catch-all" phrase. In *Lugar*, the state's involvement was totally passive (*i.e.*, the passage of legislation), while here Respondent Police Officers' involvement consisted of active and substantial assistance.

D. Theories of State Action.

This Court has fashioned several theories under which an aggrieved party may establish the existence of state action: the symbiotic relationship test; the public function test; the nexus or state compulsion test; and the joint participation test. Liability as a state actor clearly attaches to KSDK under the joint participation test, the symbiotic relationship test and the nexus test.

(1) *Joint Participation Test.*

> 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . .'

Adickes v. S. H. Kress and Co., 398 U.S. 144, 152 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

Unquestionably, Respondent KSDK's news crew jointly participated with Respondent Police Officers in violating Petitioners Parkers' constitutional rights. The meeting between Respondent KSDK's news crew and Respondent Police Officers was prearranged, and Respondent KSDK's news crew rode in the police car and were driven by Respondent Police Officers to the Parkers' home. Respondent KSDK's news crew entered Petitioners Parkers' home not only on the heels of Respondent Police Officers, but with their knowledge, expectation and approval, as well. Respondent KSDK's news crew would never have been inside Petitioners Parkers' home, but for Respondent Police Officers' execution of the search warrant that evening. Respondent KSDK's news crew entered with Respondent Police Officers, remained in the home during the entire search, and left with Respondent Police Officers. Respondent KSDK's news crew then went with Respondent Police Officers directly to another home to film a similar warrant being executed. It is difficult to imagine a scenario in which Respondent Police Officers might have acted more closely in concert with Respondent KSDK's news crew, short of Respondent Police Officers holding Respondent KSDK's cameras for them.

Respondent KSDK's news crew was no more privileged to be granted access to Petitioners Parkers' home than family or friends of Respondent Police Officers, had the latter elected to invite them to watch the search warrant

being executed. "The First Amendment generally grants the press no right to information . . . superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). *See: Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); and *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

This Court in *Lugar* did not require that a private party's actions rise to the level of a conspiracy to constitute state action. State action may be established merely when the private party "has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. Indeed, the plaintiff in *Lugar* did not allege any conspiracy or even collusion between the County officials and defendant corporation.

Public benefits arise from encouraging police officers to comply with the clear mandates of the Fourth Amendment when conducting otherwise lawful searches in private homes. Indeed, Justice White speaking for the majority in *Lugar* noted that a finding of state action should be limited to situations where "the conduct allegedly causing the deprivation of a federal right . . . [is] *fairly attributable* to the State." *Lugar*, 457 U.S. at 937 (emphasis added). Here, Respondent Police Officers permitted and facilitated Respondent KSDK news crew's entry into Petitioners Parkers' home. Respondent Police Officers' restraint of all of the home's occupants at gun point and the herding of them into one room, greatly facilitated Respondent KSDK news crew roaming freely throughout the house, seizing and capturing the occupants' visual images and footage of their home, at will. This conduct is precisely the sort that the drafters of the Civil Rights Act in 1871 sought to prohibit.

Indeed, it has been suggested that state action may be established merely where the private party "derives some 'aid, comfort, or incentive,' either real or apparent, from

the state." *Lucas v. Wisconsoin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973) (citing *Adickes*, 398 U.S. at 212 (Brennan, J. concurring)).

Furthermore, state action by a private party may be established by circumstantial evidence; proof of the existence of an explicit agreement is not required. Writing for the majority in *Adickes*, Justice Harlan noted that the jury might "infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.*, 398 U.S. at 158. As so aptly noted in *Lucas*, to act under color of law means only the " 'appearance, semblance, or *simulacrum*, but not necessarily the reality.' " *Id.*, 466 F.2d at 655 n.38.

Accordingly, here Respondents KSDK and Police Officers jointly agreed for Respondent KSDK's news crew to be present and to enter Petitioners Parkers' home under the guise of the search warrant. There need not be an agreement to violate Petitioners Parkers' Fourth Amendment rights or a sharing of a common motive or purpose to constitute a Fourth Amendment violation.

(2) *Symbiotic Relationship and Nexus Tests.*

This Court enunciated the symbiotic relationship test in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) and found it to exist where the "State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the scope of the challenged activity, which on that account, cannot be considered . . . without the scope of the Fourteenth Amendment." In *Burton*, plaintiff sued a municipal parking authority and a restaurant for violation of civil rights. The restaurant leased space from the state parking authority. This Court found that the restaurant was a state actor because both parties received an ongoing benefit from the lease agreement. Similarly, Respondents

KSDK and Police Officers mutually benefitted from Respondent KSDK news crew's entrance into Petitioners Parkers' home. Respondent Police Officers enabled Respondent KSDK to produce a story for their commercial news broadcasting publicizing Respondent Police Officers' gun suppression efforts. The facts in the instant case also support a clear "nexus" between the acts of Respondent Police Officers and the acts of Respondent KSDK's news crew.

This Court has not established any single test that can be applied to determine when state action has occurred. Instead, this Court has noted that "[o]nly by sifting facts and weighing circumstances" can the courts determine if a private party has engaged in state action. *Burton*, 365 U.S. at 722. As in *Burton*, Respondent Police Officers attempted to cloak Respondent KSDK's news crew with the former's authority and to grant them access to Petitioners Parkers' home under the aegis of Respondent Police Officers' warrant.

> '[W]hen authority derives in part from the Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.'

Reuber v. United States, 750 F.2d 1039, 1057 (D.C. Cir. 1984) (quoting with approval *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 n.8 (1952).

CONCLUSION

For the foregoing law, equities and reasons, Petitioners Sandra C. Parker and Dana M. Parker respectfully petition this Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

FRANK SUSMAN *
GREGORY K. ALLSBERRY
WENDY S. BRAFMAN
SUSMAN, SCHERMER, RIMMEL
& SHIFRIN, L.L.C.
Aragon Place—Tenth Floor
7711 Carondelet Avenue
St. Louis, Missouri 63105-3388
(314) 725-7300
Counsel for Petitioners

* Counsel of Record